No. 81812-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals No. 60158-0-I

ANDREA SHOEMAKE, by and through JULIE SCHISEL, Guardian ad Litem, and KEITH SHOEMAKE, and their marital community,

Respondents/Cross-Petitioners,

v.

R. DOUGLAS P. FERRER and JANE DOE FERRER, husband and wife

Petitioner/Cross-Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENTS/CROSS-PETITIONERS ANDREA AND KEITH SHOEMAKE

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I. SUPPLEMENTAL STATEMENT OF ISSUES

1. Does the "reasonableness" evaluation required by RPC 1.5 mean that Ferrer never had an absolute right to a 40% contingent fee?

2. Under what circumstances does a Washington attorney forfeit a contingent fee?

3. Do traditional Washington mitigation concepts support the majority rule adopted by the Court of Appeals below?

4. May Washington courts consider fee forfeiture and/or disgorgement, when determining a "reasonable" fee under RPC 1.5?

5. Should the Court adopt a bright-line distinction between claims based upon an attorney's breach of the standard of care as compared to claims based upon an attorney's breach of fiduciary duty?

6. Should the Court establish standards to govern fee forfeiture and disgorgement decisions?

7. Applying Washington fee forfeiture standards, did Ferrer's breaches of fiduciary duty forfeit his claim to credit for a hypothetical, contingent fee?

II. ARGUMENT

A. The *Restatement* Majority Rule Best Comports with Washington Law.

The Court of Appeals embraced "the modern majority rule adopted by the *Restatement* [because]...[r]educing a successful malpractice plaintiff's damages by the amount that the attorney would have earned had the attorney not been negligent necessarily fails to put the injured plaintiff in the position he or she would have occupied in the absence of negligence." *Shoemake c. Ferrer,* 143 Wn.App. 819, 828-829, 182 P.3d 992 (2008). The Court reasoned that "[b]ecause Washington cases are unambiguous that legal malpractice damages should fully compensate plaintiffs injured by attorney malpractice... the majority rule adopted by the *Restatement* is the best rule for Washington." *Id.* at 828-29. The Court of Appeals thus protected the innocent client from having to pay "two sets of attorney's fees" for a "single recovery" on one underlying claim. *Id.* at 829. Accord, *Carbone v. Tierney,* 151 N.H. 521, 864 A.2d 308, 319-20 (2004); *Akin, Gump, Strauss, Hauer & Feld, LLP v. Nat'l Development and Research Corp.,* 232 S.W.3d 883, 899 (Tex. App. 2007)(*rev. granted* 8/29/08).

The Court of Appeals correctly decided this issue. Shoemake Ans. to Pet. for Review, pp. 7-9; App. Op. Br. in Ct. of Appeals), pp. 20-26; App. Reply Br. in Ct. of Appeals, pp. 15-16. Its analysis also comports with numerous other fundamental concepts of Washington law governing

the attorney-client relationship and damages, discussed next.

1. Ferrer's Position Conflicts with RPC 1.5.

At his most fundamental, Ferrer argues that "[h]ad the underlying suit been handled properly, plaintiffs would not ever have seen the contingent fee portion of the principal recovery." Pet. for Rev., p. 10. However, RPC 1.5 subjects *every* fee to a reasonableness analysis. See, RPC 1.5, Comment 3 ("Contingent fees, like any other fees, are subject to the reasonableness standard of paragraph (a) of this Rule"). Indeed, even those fee agreements "that may seem fair to a client at the time that the agreement is signed, must be re-evaluated...when subsequent events alter the circumstances of the relationship." *Cotton v. Kronenberg,* 111 Wn. App. 258, 272, 44 P.3d 878 (2002)(applying RPC 1.8). Thus, "the attorney's obligation to avoid charging an excessive fee is continuous throughout the life of the [contingent fee] agreement." *Holmes v. Loveless,* 122 Wn. App. 470, 94 P.3d 338 (2004). Ferrer, therefore, *never* had an unassailable right to a full 40% contingent fee as he claims; instead, his fee was subject to evaluation for reasonableness under RPC 1.5.[1] Fee

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1 If a client changes attorneys without just cause, the client should *not* be charged *two* contingent fees to complete the same work. See, 1 *Restatement (Third) of the Law Governing Lawyers* §40, p. 291 (ALI 2000)(The client's right to discharge counsel "should not be encumbered by permitting the lawyer the option of either recovery at the contractual rate or in quantum meruit without appropriate adjustment for work yet to be performed").

forfeiture is part of that evaluation.

2. A Washington Attorney Forfeits a Contingent Fee If Discharged for "Good Cause"

If a Washington attorney withdraws for "good cause" or the client terminates the attorney's services "without cause" prior to fulfillment of the contingency covered by the contingent fee agreement, the attorney may nevertheless recover in *quantum meruit. Belli v. Shaw,* 98 Wn.2d 569, 576-77, 657 P.2d 315 (1983); *Taylor v. Shigaki,* 84 Wn. App. 723, 728, 930 P.2d 340 (1997). See further, *Restatement, supra,* §40, pp. 289-297.

However, in the specific context of reasonableness under RPC 1.5, this Court has long held that "[w]hen an attorney is guilty of fraudulent acts or gross misconduct in violation of a statute or against public policy, the client may have a complete defense to the attorney's action for fees." *Dailey v. Testone,* 72 Wn.2d 662, 664, 435 P.2d 24 (1967)(and cases there cited). Accord, *Ross v. Scannell,* 97 Wn.2d 598, 610, 647 P.2d 1004 (1982). See discussion, *infra,* pp. 5-6, 7-10.

Conceptually then, fee forfeiture has traditionally functioned as a parameter in the determination of "reasonableness" under RPC 1.5. Contrary to Ferrer's analysis [Pet. for Rev., pp. 10-11], such a

reasonableness determination under RPC 1.5 has nothing to do with "punitive damages." See, Ans. to Pet. for Review, pp. 9-10 and n. 5.

Thus, if an attorney withdraws *without* "good cause," *or* if the client terminates the attorney's services for "good cause," then the attorney forfeits (or "abandons") the contingent fee. *Farwell v. Colman,* 35 Wash. 308, 77 P.379 (1904). See, *Restatement, supra,* §40(2) and cmt. (b), (c), pp. 289-294. The attorney in *Farwell,* for example, represented the clients in a condemnation proceeding, under a contingent fee agreement. *Farwell, supra,* 35 Wash. at 310. The attorney originally performed services between 1890 and 1893, during which time the clients recovered a judgment which the Supreme Court reversed and remanded for a new trial. *Id.* at 310-311. In striking similarity to Ferrer's conduct here, the attorney did *not* pursue retrial for a period of more than 10 years despite the clients' requests that he proceed to trial. *Id.,* at 311-12. This Court denied the attorney *any* fee, holding that the attorney's failure to pursue the case "severed" the attorney-client relationship—in effect, a constructive withdrawal from the representation due to the attorney's neglect. That the attorney had abandoned the case without good cause freed the clients to resolve the case without paying *any* fee. *Id.* at 315.

Ferrer's delay, outright lies, and deceit constitute the same kind of constructive withdrawal from representation, without "just cause." He thus forfeited any claim to a fee long before Mr. and Mrs. Shoemake discharged him and retained replacement counsel. Accord, *Ausler v. Ramsey,* 73 Wn. App. 231, 238-39, 868 P.2d 877 (1994)("[W]ithout sufficient justification shown in this record, he voluntarily withdrew before the contingency was realized…[and thus] waived his fee").

3. The Majority Rule Comports with Traditional Washington Mitigation Concepts.

The Court of Appeals' analysis, and the majority rule, also comport with traditional Washington concepts of mitigation. Washington thus allows an injured victim to recover, *as damages*, the victim's reasonable mitigation expenses incurred as a result of the tortfeasor's actions. *E.g., Flint v. Hart,* 82 Wn. App. 209, 224, 917 P.2d 590 (1996); *Hyde v. Wellpinit Sch. Dist.,* 32 Wn. App. 465, 469, 648 P.2d 892 (1982); *Kubista v. Romaine,* 14 Wn. App. 58, 64, 538 P.2d 812 (1975), *aff'd,* 87 Wn.2d 62, 549 P.2d 491 (1976). Accord, *Restatement, supra,* §53, cmt. f, p. 393 ("The rule barring recovery of fees does not prevent a successful legal-malpractice plaintiff from recovering as damages additional legal expenses reasonably incurred outside

the malpractice action itself as a result of a lawyer's misconduct").

The contingent fee of replacement counsel necessary to mitigate the effects of Ferrer's malpractice thus offsets Ferrer's hypothetical 40% contingent fee - an issue that *Moores v. Greenberg,* 834 F.2d 1105, 1109 n. 7 (1st Cir. 1987) recognized but left "for another day." See, *Shoemake, supra,* 143 Wn. App. at 826-27. Indeed, Ferrer's primary authority, Mallen & Smith, elsewhere *agrees* that the client in a legal malpractice case may recover attorney fees incurred to mitigate the negligent attorney's malpractice. 3 Mallen & Smith, *Legal Malpractice,* §§21.6 and 21.10, pp. 22-24, 31-34 (2008 ed).

Traditional mitigation concepts thus coincide with evaluation of reasonableness under RPC 1.5, as well as the fundamental policy that a client should not be required to pay two full contingent attorney fees to achieve a single result. The Shoemake damages, therefore, include recovery of replacement counsel's fees to complete the underlying contingency.

4. Fee Forfeiture Relieves the Client of Proving Proximate Cause or Damage when the Attorney Acts Negligently or Fraudulently.

Consistent with RPC 1.5, fee forfeiture relieves clients from the burden of proving proximate cause or harm as a result of the attorney-

fiduciary's breach of the duty of loyalty, because breach of the duty of loyalty defeats the basis for the attorney's compensation. See, Ans. to Pet. for Rev., pp. 10-11, *citing, Eriks v. Denver,* 118 Wn.2d 451, 457, 824 P.2d 1207 (1992); *Mersky v. Multiple Listing Bureau,* 73 Wn.2d 225, 437 P.2d 897 (1968); *Marriage of Petrie,* 105 Wn. App. 268, 276, 19 P.3d 443 (2001) (fiduciary forfeited fees despite "net benefit" to beneficiaries).[2]

Fee forfeiture, in effect, *replaces* the traditional burdens imposed upon innocent victims to prove the measure of damages and proximate cause. This sort of presumption is *not* unique to the attorney-client or fiduciary-beneficiary relationships; instead, remedial relief in the form of "presumed" damages arises in other Washington legal settings, such as coverage by estoppel (substitute measure of damages) and a presumption of harm (substitute for proximate cause) when an insurer acts in bad faith while defending under a reservation of rights. *Mut. of Enumclaw Ins. Co v. Dan Paulson Constr. Co.,* 161 Wn.2d 903, 919-22, 169 P.3d 1 (2007); *Kirk v. Mt. Airy Ins. Co.,* 134 Wn.2d 558, 563, 951 P.2d 1124 (1998)("The

2 The attorney's breach of duty may also constitute a "material breach of contract" that justifies abandonment of the contract by the non-breaching party. *Restatement, supra,* §37, cmt. a, p. 271-72. See, WPI 302.03. Each attorney-client engagement and undertaking includes an implied condition that the attorney will comply with the standard of care and be truthful to the attorney's client. RPC 1.0(d) and 1.1.

rebuttable presumption [of harm] must be applied because an insured should not be required to prove what might have happened had the insurer not breached its duty to defend in bad faith"); *Besel v. Viking Ins. Co.,* 146 Wn.2d 730, 738, 49 P.3d 887 (2002)("the amount of the covenant judgment is the presumptive measure of an insured's harm"). Washington similarly allows "presumed" damages as a remedy for defamatory statements made with actual malice. *E.g., Momah v. Bharti,* 144 Wn. App. 731, 741 n. 4, 182 P.3d 455 (2008); *Dodson v. Morgan Stanley DW, Inc.,* 2007 WL 3348437 *15-16 (W.D. Wash.).[3] See further, *Restatement, supra,* §37, cmt. b, p. 272 (ALI 2000)("The damage that [lawyer] misconduct causes is often difficult to assess").

Rather than require Washington clients who have proven attorney malpractice to further litigate over the "value" of the negligent attorney's legal services, the Court should instead presume that the clients' damages include forfeiture of the attorney's hypothetical contingent fee. See, *Carbone, supra,* 864 A.2d at 320. See further, 1 *Restatement, supra,* §37,

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3 Washington statutorily authorizes double or treble damages in various settings, *e.g.*, RCW 9A.82.100; RCW 19.86.090; RCW 49.52.070. Such damages "serve the *nonpunitive* purpose of compensating victims for their losses, and...afford[] incentive to litigate against the perpetrators." *Winchester v. Stein,* 135 Wn.2d 835, 858, 959 P.2d 1077 (1998). Fee forfeiture functions in similar remedial and *non*-punitive fashion, albeit without specific legislative authorization. See n. 5, *infra.*

cmt. a, pp. 271-72. Thus a "reasonable" fee under RPC 1.5 should *not* include the hypothetical contingent fee that the attorney would have earned but for the attorney's malpractice.

B. The Court Should Establish a Bright-Line Distinction Between Legal Malpractice and Breach of Fiduciary Duty Causes of Action.

Ferrer breached his fiduciary duties to Mr. and Mrs. Shoemake by repeatedly lying to and deceiving them over the course of more than 10 *years*. CP 42-43, 270-71. Eighty years ago, Justice Cardozo, Chief Judge of the New York Court of Appeals at the time, articulated the seminal definition of a fiduciary's duty and the courts' role in enforcing that duty:

> Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. **Not honestly alone, but the punctilio of honor the most sensitive**, is then the standard of behavior. As to this there has developed **a tradition that is unending and inveterate. Uncompromising rigidity** has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. **Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd.** It will not consciously be lowered by any judgment of this court. (Emphasis added.)

Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 546 (1928), *quoted with approval in Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567, 570, 564

P.2d 1175 (1977). In keeping with Justice Cardozo's admonition, Washington requires (or should require) unflinching adherence to the Rules of Professional Conduct "for the benefit of the public," *not* the Bar. *Eriks, supra,* at 461.

Nevertheless, citing *Kelly v. Foster,* 62 Wn. App. 150, 813 P.2d 598 (1991), Ferrer argues that this makes no difference because "the law does not provide for separate civil remedies for legal malpractice and breach of fiduciary duty by an attorney." Ferrer Reply in Support of Pet. for Review, p. 4. He thus reasons that "[w]here the breach of fiduciary duty does not cause identifiable loss to the client, the remedy is a public one, with the Bar Association, rather than a private remedy." *Id.,* pp. 4-5.[4] Accord, *Bertelsen v. Harris,* 537 F.3d 1047, 1058 (9th Cir. 2008). In Ferrer's formulation, Washington courts may *not* adjust an attorney's fees to protect clients from their attorneys' breaches of fiduciary duty unless the clients also prove proximate cause and damage resulting from the breach.[5]

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4 *Hizey v. Carpenter*, 119 Wn.2d 251, 259, 830 P.2d 646 (1992) said that "[w]here the breach of fiduciary duty does not cause identifiable loss to the client, the remedy is a public one with the Bar Association, rather than a private remedy." (Emphasis added). *Hizey*, however, also reaffirmed the Court's commitment to *Eriks*, which it had decided only six months before. *Id.*, 119 Wn.2d at 264. See discussion, *infra*, p. 11-14.

5 The trial court awarded "sanctions... for [Ferrer's] deceit, misrepresentation, and breach of fiduciary duty." CP 271. The Court of Appeals reversed [143 Wn. App. at 830-32] and this Court denied cross-review of that particular issue. Absent application of fee forfeiture principles, these clients will be *denied any* remedy for their attorney's breaches of fiduciary duty.

Ferrer's confused analysis is not uncommon, but fundamentally wrong-headed nonetheless. See, 2 Mallen & Smith, *Legal Malpractice,* §15.2, pp. 644-56 (2008 ed.)("Thus, the standard of care [*i.e.*, malpractice] concerns negligence and the standard of conduct [*i.e.*, fiduciary duty] concerns a breach of loyalty or confidentiality"). Accord, *Ulico Casualty Co. v. Wilson, Elser, Moskowitz, Edelman & Dicks,* 843 N.Y.S.2d 749, 757, 16 Misc.2d 1051 (N.Y. Sup. 2007), *aff'd. as modified,* 56 A.D.3d 1, 865 N.Y.S.2d 14 (2008)("breach of fiduciary duty claims 'do not relate to the manner in which the attorney pursued the underlying case, but rather **the manner in which the [attorneys] interacted with their client.**'")(emphasis added); *In re: SRC Holding Corp.,* 364 B.R. 1, 41-42 and n. 59, 49-50 (D. Minn. 2007); W. Gregory, *The Fiduciary Duty of Care: A Perversion of Words,* 38 Akron L.R. 181 (2005)("This conflation...is not a mere matter of semantics, but threatens to obfuscate legal reasoning."); *Restatement, supra,* §37 cmt. (a), p. 272, and §§ 48, 49, pp. 342-52 (distinguishing between breach of fiduciary duty and professional negligence). Indeed, *Kelly* confuses these two distinct concepts, considering that: (1) the lower court instructed the jury that "the terms 'legal malpractice' or 'breach of fiduciary duty' are used interchangeably" [62 Wn. App. at 153]; and (2) the appellate court

characterized non-disclosure of multiple conflicts of interest as "a legal malpractice action" when it should have recognized that non-disclosure of conflicts of interest constitute breaches of fiduciary duty.

The "better analytical approach is to recognize that an attorney's duties to a client include two obligations: (1) competent representation [*i.e.*, the standard of care]; and (2) compliance with the fiduciary obligations." 2 Mallen & Smith, *supra,* §15.2 at p. 646. Regrettably, no Washington case has articulated this distinction (although *Eriks* correctly applied these principles).

The distinction between "legal malpractice" and "breach of fiduciary duty" may assume crucial importance in the context of remedies due to Ferrer's undisputed breaches of fiduciary duty and Washington's long recognition that fee forfeiture and disgorgement represent appropriate remedies for such breaches. See, Ans. to Pet. for Review, pp. 9-10, 13-14 and n. 5. Indeed, *Eriks* implicitly recognized this distinction when it affirmed the lower court's fee forfeiture remedy without proof of proximate cause, intent, or resultant damage, even though the clients' legal malpractice claims were "reserved...for trial." *Eriks v. Denver, supra,* 118 Wn.2d at 462.[6]

6 The Court of Appeals apparently did not recognize that no substantive distinction exists between forfeiture and disgorgement for purposes of remedying a breach of fiduciary duty. The Court thus reasoned, in error, that *Eriks* is "inapplicable [because] Ferrer has no fee that can be disgorged." *Shoemake, supra,* 143 Wn. App. at 828 n. 4.

Ferrer's "dissembling" [Ferrer's. Appeal Br., p. 22] and non-disclosure of material facts to his clients [CP 270-71] provide superb examples of an attorney's breach of fiduciary duty, distinct from his breach of the standard of care (*i.e.,* legal malpractice). See, Ans. to Pet. for Rev., pp. 12-14. Ferrer's ethical misconduct thus related to *the manner in which he interacted with his clients, rather than the manner in which he pursued the underlying case.* He thus breached the fiduciary duty of loyalty, separate and apart from his legal malpractice in the underlying matter.

The Court should therefore establish a bright-line holding that a client's breach of fiduciary duty and legal malpractice claims are *not* "interchangeable;" instead, an attorney's breach of the fiduciary obligations which implicate the attorney's interaction with the client give rise to a cause of action for breach of fiduciary duty rather than legal malpractice. This conclusion is entirely consistent with this Court's prior decisions. *E.g., Eriks, supra,* 118 Wn.2d at 458-61 (conflicts of interest; RPC 1.7); *Valley/50th Ave., LLC v. Stewart,* 159 Wn.2d 736, 743-48, 153P.3d 186 (2007) (RPC 1.8). The Court should therefore clarify *Kelly* consistent with this formulation.

C. The Court Should Establish Washington Standards to Govern Fee Forfeiture and Disgorgement Remedies.

Despite Washington's long-standing recognition of fee forfeiture and disgorgement as appropriate remedies for an attorney's breach of fiduciary duty, no Washington case has established standards to govern the exercise of discretion relative to fee forfeiture and disgorgement. See, *Bertelsen, supra,* 537 F.3d at 1057 ("no Washington decision has ever established the legal standard to guide those decisions").

Mr. and Mrs. Shoemake nevertheless *agree* with Ferrer that Washington "cases do not mandate a forfeiture of fees" in *all* cases involving a breach of fiduciary duty. Ferrer Reply to Pet. for Review, p. 5. Washington case law has nevertheless established certain parameters for making such decisions. For example, *Kane v. Kos,* 50 Wn.2d 778, 789, 314 P.2d 672 (1957) establishes a low-end threshold that "a swindler" forfeits his/her fees. Similarly, *Kelly, supra,* 62 Wn. App. at 157 echoed this low-end threshold when it reasoned that a fiduciary's "'*fraudulent acts* or *gross misconduct* in violation of a statute or against public policy'" warrant fee reduction or forfeiture.

This Court, however, would establish a truly *embarrassing* standard *if* it were to hold that the Washington attorneys are entitled to recover their full fees, regardless of the quantity and/or quality of their

fiduciary breaches, so long as the attorneys do not actually defraud their clients as "swindlers" or "con artists." This Court and the public should rightly demand a significantly higher standard of conduct from the legal profession. See, App. Open. Br. in Ct. of Appeals, pp. 26-28.

Fortunately, this Court has *never limited* the reduction or forfeiture of a fiduciary's fees to *only* situations that involve "swindlers" or "knowing intentional" misconduct, or "fraudulent acts" or "gross misconduct." To the contrary, *Eriks* held that "'**[i]t is no answer to say that fraud or unfairness were not shown to have resulted.**" *Eriks, supra,* 118 Wn.2d at 462, *quoting Woods v. City Nat'l Bank & Trust Co.,* 312 U.S. 262, 268-9, 85 L. Ed. 820, 61 S. Ct. 493 (1941). Accord, *Mersky, supra,* 73 Wn.2d at 231 (**"It is of no consequence**, in this regard, that the broker may be able to show that the breach of his duty of full disclosure and undivided loyalty **did not involve intentional or deliberate fraud**."). *Mersky,* for example, ordered forfeiture of a realtor's fees due to non-disclosure of his relationship to the buyer, explaining that "**[h]owever inadvertently this failure occurred,** it constituted a distinct breach of respondents' duty of full disclosure and an intrusion upon the obligation of undivided loyalty." *Id.,* 73 Wn.2d at 233 *(emphasis added).*

Thus, under this Court's prior decisions, even an inadvertent breach of fiduciary duty may warrant a reduction or forfeiture of fees. See, *Restatement, supra* §49, p. 349, cmt. *d* ("[A] lawyer who violates fiduciary duties to a client is subject to liability even if the violation or the resulting harm was not intended"); *Ross v. Scannell, supra,* 97 Wn.2d at 610; *In re: Corporate Dissolution of Ocean Shores Park,* 132 Wn. App. 903, 910-14, 134 P.3d 1188 (2006)("[A]ttorney who fails in his ethical and professional duties may not reap any benefits from his clients' ignorance"); *Gustafson v. City of Seattle,* 87 Wn. App. 298, 304, 941 P.2d 701 (1997); 2 Mallen & Smith, *Legal Malpractice, supra,* §15.24, p. 798 ("Even an attorney who acted in good faith may lose the right to recover fees if a fiduciary breach occurred....").

Beyond these parameters, what standard should this Court adopt? The *Restatement* §37, for example, employs a "clear and serious violation" standard inconsistent with Washington jurisprudence and circular in its reasoning. The *Restatement* describes a "clear" violation as based upon a "reasonable lawyer" standard. Thus, in the *Restatement* formulation, an attorney could apparently enforce a "forbidden" fee agreement, as did the Ninth Circuit in *Bertselsen, supra,* if "the lawyer followed on reasonable

interpretation" of the contract. *Restatement, supra,* §37, cmt. d, p. 273. In Washington, in contrast, improper fee agreements and charges are void. *E.g., Valley/50th Ave., supra.,* 159 Wn.2d at 743. Furthermore, whether a Washington attorney has violated the Rules of Professional Conduct constitutes an issue of law. *Eriks, supra,* 118 Wn.2d at 457-58. *Eriks* thus disregarded the two expert witnesses who opined that the attorney did *not* have a conflict of interest. *Id.* See further, *e.g., SRC Holding, supra,* 364 B.R. at 35-40, 41-49 (involving vigorously disputed and complex facts). Washington courts therefore do not (and should not) excuse an attorney's breach of fiduciary duty simply for lack of "clarity."

Moreover, when is a breach of fiduciary duty *not* "serious"? The *Restatement* concludes that courts should generally *condone* breaches of fiduciary duty (by *not* ordering fee forfeiture) "when the lawyer has not done anything willfully blameworthy." *Restatement, supra,* §37, cmt. (d), p. 273. The *Restatement* also identifies factors including the "extent of the misconduct," whether "repeated or continuing violations" have occurred, whether the breach involved knowing violation or conscious disloyalty to the client, and "the seriousness of the offense" as factors the courts should consider when determining whether to order fee forfeiture and, if so, the

extent of the forfeiture. *Id.* The *Restatement,* however, also recognizes that while "[m]inor violations do not justify leaving the lawyer *entirely* unpaid...*some such violations will reduce the size of the fee* or render the lawyer liable to the client for any harm cause []." *Restatement,* §37, cmt. d, p. 273 (emphasis added).

Washington cases such as *Eriks* and *Mersky,* in contrast, establish that fee forfeiture does *not* depend on whether the fiduciary's breach is "serious." The standards adopted in Minnesota, therefore, better fit Washington case law. See, *SRC Holding, supra,* 364 B.R. at 50 ("[I]f the breach involves bad faith,[7] the attorney forfeits all rights to compensation").

Whatever standard it adopts, this Court should treat *all* breaches of fiduciary duty as "serious" and insist that attorneys strictly comply with their obligations under the RPC's for the benefit of clients. See, *SRC Holding, supra,* 364 B.R. at 49-50 ("unyielding in its assessment of penalties when a fiduciary...has breached any of its obligations"). Thus, if the attorney violates the RPC's in connection with the attorney-client relationship, then fee forfeiture (whether in whole or in part) should represent the norm rather than

7 "Bad faith" in this context does *not* require actual fraud; instead, an attorney's "constructive fraud" constitutes "bad faith." *Restatement, supra,* §49, cmt. (a), p. 348. See, Ans. to Pet. for Rev., p. 17.

the exception as it does now. See, *Chen v. Chen Qualified Settlement Fund,* __F.3d __, 2009 WL 18726 (2nd Cir. 2009)("'an attorney who engages in misconduct by violating the disciplinary rules is not entitled to legal fees.'"). In this manner, the Court will encourage attorneys to fulfill the punctilio of honor most sensitive owed to their clients while protecting Washington citizens from conduct that falls below the RPC's.

Under any standard, however, Ferrer's breaches of fiduciary duty forfeited any claim to credit for a hypothetical fee.

CONCLUSION

The Court of Appeals reached the correct result. Respondents thus request that this Court affirm the result in the Court of Appeals, regardless of the analysis it adopts for purposes of affirmance, and award Mr. and Mrs. Shoemake all costs and other relief to which they are entitled.

DATED: January 15, 2009.

By: _____

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STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

Nicole Cattin, being first duly sworn, upon oath deposes and says:

1. I am employed as a Paralegal at the LAW OFFICES OF ROBERT B. GOULD, attorney for Respondents Andrea and Keith Shoemake and Julie Schisel, Guardian ad Litem, above named.

2. On January 15, 2009 I caused to be sent out for service upon the below parties one (1) copy of each of the following documents:

(a) Supplemental Brief of Respondents/Cross Petitioners Andrea and Keith Shoemake; and

(b) this Affidavit of Service.

3. The copies were sent, VIA ABC LEGAL MESSENGER, to the respective parties noted below, as follows:

John Rankin, Esq.
REED MCCLURE
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Attorney for Respondents R. Douglas P. Ferrer and Jane Doe Ferrer

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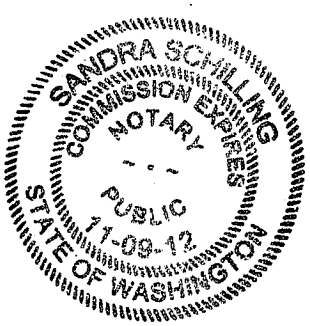
DATED this 15th day of January, 2009

Nicole Cattin

SUBSCRIBED AND SWORN TO BEFORE ME this 15th day of January, 2009.



Sandra Schilling
NOTARY PUBLIC for the State
of Washington
Residing at Seattle
My Commission Expires: 11/09/12